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In the Supreme Court of the United States

OCTOBER TERM, 1972

72-1610

IRVING GREENSPHAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Irving Greensphan, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on April 12, 1973.

Opinion Below

The opinion of the Court of Appeals is presently unreported. It is reprinted as Appendix A, infra.

Jurisdiction

The judgment of the Court of Appeals (Appendix B, infra) was entered on April 12, 1973. A timely Petition for Rehearing was filed, and was denied on May 2, 1973. (Appendix C, infra) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented for Review

1. Whether it is a scheme to defraud within the scope of the mail fraud statute for a manufacturer to pay monies to a purchasing agent absent actual loss by the agent's principal, or proof of other advantages obtained or intended to be obtained by the manufacturer?

2. Whether a victim of extortion may be prosecuted under the mail fraud statute by reason of his payment of kickbacks in response to the extortionate threat?

Statement of the Case

Petitioner Irving Greensphan was charged with Peter Yonan and Andrew George in a nineteen count indictment with devising a scheme and artifice to, "defraud and to obtain money and property by means of false and fraudulent pretenses and representations from Zenith Radio Corporation * * *" and with using the mails in execution of that alleged scheme, in violation of Title 18, United States Code, Sections 2 and 1341.

The indictment alleged that, as a part of the scheme, Yonan, an employee of Zenith, placed orders on behalf of Zenith to purchase cabinets from the Accurate Box Corporation, which was owned by the defendant Greensphan.

The indictment also charged that George billed Accurate for commissions and "kickbacks" on cabinets sold by Accurate to Zenith by submitting estimates from A & G Wood-

working, Estimating and Sales, Inc., owned by defendant George, to Accurate, and that Greensphan paid money to A & G based upon the number of cabinets sold to Zenith. In turn, George paid money to Yonan from the monies received by A & G from Accurate.

Lastly, the indictment charged that the defendants failed to disclose to Zenith that its employee, Yonan, was deriving commissions and kickbacks as a result of business conducted by him on behalf of Zenith, thereby depriving Zenith of its money and property; and that the defendants continued to represent to Zenith that Yonan was honest and loyal to the best interest of Zenith, and that they failed to disclose Yonan's "conflict-of-interest and disloyalty," thereby depriving Zenith of the honest and faithful performance of Yonan's duties.

Each count of the indictment alleged the mailing by Zenith of a check to Accurate in payment of cabinets manufactured for Zenith by Accurate.

Petitioner, Yonan and George were tried jointly before a jury, and each was found and adjudged guilty. Greensphan was sentenced to a term of six months in the custody of the Attorney General, and fined $1000 on each count.[1]

At trial, Greensphan was the only defendant to testify. Subsequently the prosecuting Assistant United States Attorney said, "* * * what [Greensphan] said from the witness stand was the substantial truth as to the transactions involved with the parties here." (Tr. 723) The prosecution's evidence and Grensphan's testimony thus established the facts of this case without contradiction.

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[1] Count 18 was dismissed prior to the submission of the case to the jury.

In approximately 1951, the Petitioner purchased the Accurate Box Corporation, and a few years thereafter met defendant Yonan, who subsequently was employed by Zenith Radio Corporation. In mid-1966 one P. J. Maloney, a Zenith purchasing agent and Yonan's immediate superior, asked Greensphan to look at Zenith's proposed new cabinet, to be called the "Circle of Sound." An employee of Greensphan's met with Zenith engineering personnel, and concluded that Zenith's proposal was not feasible. (Tr. 269-71; 427) The Zenith plans were given to Greensphan who, working with Zenith personnel, redesigned the cabinet. (Tr. 271-2; 370; 428-31) After approximately three months work, Greensphan submitted a revised model to Zenith, along with a tentative bid, dated September 26, 1966, and addressed to Maloney. The bid reflected a total price of $25.18 per unit, and included a revealed profit of $2.25 per unit. Normally, Zenith permitted its suppliers a 10% profit on items sold to Zenith. (Tr. 76)

Zenith sought but did not receive competitive bids on the Circle of Sound units. Maloney and Yonan solicited bids from five Zenith suppliers, including a Zenith subsidiary, but all refused to bid on the project. (Tr. 83-4; 378-80) Yonan was described by Maloney as having "primary responsibility" for negotiating with Greensphan for the purchase of small cabinets, but he was subordinate to Maloney in this area. Moreover, Zenith's sales department dictated the number of items to be ordered, and the frequency of the orders.

On February 9, 1967 Zenith issued a purchase order to Accurate Box for 1500 Circle of Sound units at a price of $25.18 per unit. Subsequently Maloney told Greensphan of a possible increase in Zenith's requirements for the

unit. In preparation for this anticipated increase in production Greensphan negotiated with union representatives to operate his plant during a contracted vacation period. In addition, Greensphan borrowed $50,000 and purchased another plant. (Tr. 427, 278)

During June, 1967, Greensphan received orders from Zenith for an additional 4743 units at a price of $30.99 per unit. The increased price resulted from blueprint revisions and engineering changes in the cabinets. On August 7, 1967, Accurate received an order for 8,050 units at a price of $30.99 per unit. On August 11, Zenith ordered an additional 7,500 cabinets at the same price.

Yonan's Demand for a Kickback

Some time during either October or November, 1967, Greensphan met with Yonan at Yonan's request. (Tr. 447-8) Yonan asked Greensphan how the quality of the Circle of Sound was progressing, and Greensphan replied that Zenith was happy and quality was good. Yonan added that he had seen reports which confirmed this opinion.

Yonan then asked if production was being stepped up, and Greensphan told him it was. Yonan replied that sales on the Circle of Sound were ever-increasing and said, "This is going to be a very big unit with Zenith Radio." Greensphan said he could not be happier because he felt his company had had the greatest part in preparing the model for marketing by Zenith.

At that point Yonan said, "You are going to make a lot of money on this unit because of the amount that you are going to be manufacturing." He added that "every-

body and their uncle" would like to manufacture the unit for Zenith. Greensphan replied that he and his company had worked hard on the unit and he certainly wanted to keep the business. Yonan repeated that the model was going to be "a big seller," and Greensphan again said that he couldn't be happier about the matter. (Tr. 451)

Then, Yonan said: "I don't want you to be a pig about this." (Tr. 451)

Greensphan asked him what he meant about not being a pig, and Yonan replied: "Well, you have a full 10%. You have a full 10% allowed into this unit that Zenith allows their suppliers, and you have got a full 10% in it." (Tr. 452)

When Greensphan replied that was the customary profit allowed by Zenith, Yonan said: "I would like to have a dollar a unit for each unit that is manufactured." (Tr. 452)

Because he was afraid of losing the business from Zenith (Tr. 458), on a project into which he felt he had put "so much time and effort and work" (Tr. 452), Greensphan agreed to pay Yonan a dollar a unit for Circle of Sound cabinets sold to Zenith. (Tr. 453)

At the conclusion of the case the Government conceded that Greensphan made the payments to Yonan because he "felt that he had to pay this money" to keep his business. (Tr. 723)

A few days after this conversation Greensphan had a telephone conversation with Yonan in which he explained that any payments made to Yonan would have to be made by check. The following Saturday, Yonan came into Green-

sphan's office and told him that Accurate would receive invoices from A & G Woodworking reflecting commissions due A & G, and that Greensphan should pay those invoices. (Tr. 468-71)

Accurate commenced making these payments to A & G Woodworking in December 1967. (Tr. 472) Payments totalling approximately $300,000 to A & G in this manner continued until December 1970. (Tr. 237-8; 472) A & G, in turn, made payments from August 1968 until August 1970 of slightly in excess of $100,000 to the defendant Yonan. (Tr. 238-9)

On April 11, 1968, subsequent to the commencement of payments to A & G Woodworking, Greensphan submitted a new bid to Zenith based on the Circle of Sound model then being produced and delivered. (Greensphan Exhibit 2) At the same time, Greensphan prepared an itemized cost sheet showing a complete breakdown of costs. (Greensphan Exhibit 2a) The bid price for the Circle of Sound at that time was $28.86, which included a profit margin of $2.57 a unit.

Two months later, the Value Engineering Cost Analysis section of Zenith prepared an eight-page itemized analysis of the price for which it felt the Circle of Sound cabinet units should be built. Alloting a profit of $2.58 per unit, Value Analysis concluded that the unit should cost Zenith $28.93 (Greensphan Exhibit 8), or 7¢ more than the existing Accurate bid. (Greensphan Exhibit 2)

Two weeks later, on June 24th, Zenith submitted and Accurate accepted a purchase order to manufacture 8,810 silghtly revised Circle of Sound units for $28.38. (Greensphan Exhibit 9)

Several cost analysists from Zenith testified that Greensphan's prices to Zenith on the Circle of Sound models were always fair and reasonable. Maloney, Yonan's superior, testified that at no time did Yonan ever request that he extend Greensphan any partiality or favoritism, and nor did Yonan himself, to Maloney's knowledge, ever extend any favors to Greensphan. Several Zenith purchasing agents, who negotiated contracts with Accurate Box for the purchase of "Circle of Sound" units, stated that Yonan treated Accurate Box impartially, and demanded strict performance and quality from Greensphan's company.

After Yonan left Zenith in late 1970, Zenith analyzed Accurate's bids on business over the prior three years. The report concluded that Accurate Box had always been the most competitive bidder on the business which it received, and that its performance on the "Circle of Sound" unit had been "outstanding", where other suppliers had wholly failed Zenith. Greensphan's company still maintained a business relationship with Zenith at the time of the trial of this case.

Reasons for Granting the Writ

I.

This most unusual mail fraud prosecution raises, on a record of extraordinary clarity, the issue of the very scope of the federal mail fraud statute. The opinion of the Court of Appeals here represents a very real extension of that statute, and opens a veritable "Pandora's Box" of potential federal prosecutions, for under its rationale virtually any undisclosed gratuity paid to an agent by reason of his employment, may be deemed a fraud actionable under the mail fraud statute.

The government's evidence together with the Petitioner's testimony, which the prosecution credited as being the "substantial truth", established that Greenspahn, a Zenith supplier, made certain payments to Yonan, a Zenith purchasing agent, at Yonan's behest and under threat of economic harm; that Zenith did not suffer any actual loss as a result of the payments; and that Greenspahn did not intend to obtain, nor did he obtain, any advantage as a result thereof.

Thus squarely raised is the issue of whether it is a scheme to defraud within the ambit of the federal mail fraud statute, 18 U.S.C. 1341, for a manufacturer to pay a kickback to a purchasing agent absent actual loss by the agent's principal, or proof of other advantage obtained or intended to be obtained by the manufacturer.

The theory that the payment of money to the agent of another corrupts the agent and dilutes his loyalty to his employer has been described as a constructive fraud.

Similarly, the receipt of commissions by an employee, because of his relationship with his employer, but not at his expense or to his detriment, has also been deemed a constructive fraud. See, *Epstein* v. *United States,* 174 F.2d 754, 763-6 (6th Cir. 1949); *Sushan* v. *United States,* 117 F.2d 110, 115 (5th Cir. 1941). These two federal circuits have recognized that the federal mail fraud statute does not reach such breaches of a purely equitable duty. *Epstein* v. *United States,* supra; *Sushan* v. *United States,* supra.[1]

Here, activities which can only be deemed a constructive fraud have been held actionable under the mail fraud statute. There can be no question but that Greensphan's payments to Yonan, and Yonan's receipt thereof, constituted nothing more than a breach of an equitable duty, as opposed to an "active fraud" which would be actionable under 18 U.S.C. 1341. Zenith suffered no monetary loss as a result of the payments, as Zenith normally permitted its suppliers to earn a 10 % profit on goods manufactured for Zenith, and Zenith had contracted with Accurate knowing that the company would be earning that 10% profit. These arrangements were established prior to Greensphan's agreeing to pay monies to Yonan, and subsequent Zenith cost studies of products purchased from Accurate, made both during the course of Greensphan's payments

[1] The mail fraud statute does reach those situations wherein a kickback is paid to secure an actual advantage, or with the intent to do so. *Sushan* v. *United States,* 117 F.2d 110 (5th Cir. 1941); *United States* v. *Proctor and Gamble Co.,* 47 F.Supp. 676 (D.C. Mass. 1942); *United States* v. *Fraser,* 303 F.Supp 380 (E.D. La. 1969). The statute may also reach those schemes wherein an employee is corruptly influenced by the payment of a kickback to give less than his faithful services to his principal, especially where the less than faithful services involved showing favoritism to the payer of the kickback. See, *United States* v. *Dorfman,* 335 F.Supp. 675, 679 (S.D.N.Y. 1971); *United States* v. *Fraser,* 303 F.Supp. 380, 383 (E.D. La. 1969).

to Yonan and after the fact of the payments had been revealed to Zenith, showed that Accurate's prices to Zenith were always fair, reasonable, and the most competitive on the business which Accurate received. Greensphan paid the monies to Yonan out of the profit which Zenith knew he was making on their business, but these funds were not generated at Zenith's expense.

To say that Zenith was deprived of the faithful services of Yonan merely because Yonan received money from Greensphan, without more, is a fiction created by principles of equity. The Fifth and Sixth federal circuits have recognized that such fictional, constructive frauds are not within the reach of the federal mail fraud statute. In affirming Petitioner's conviction upon the incontrovertible facts of this record, the Court of Appeals for the Seventh Circuit has placed itself squarely in conflict with the Fifth and Sixth Circuits on this issue, and has so broadened the reach of the statute that a torrent of mail fraud prosecutions are now possible for conduct which had not previously been deemed criminal.

II.

It was made manifestly clear at trial that Greensphan's payments to Yonan were motivated by fear that Yonan would improperly interfere with his right to freely compete for Zenith's business. Greensphan had already obtained contracts for production of "Circle of Sound" cabinets prior to being approached by Yonan, and had gained substantially all he was to gain from Zenith's business before acceding to Yonan's demand for the kickbacks. The government itself admitted that Greensphan paid the monies to Yonan because he "felt that he had to pay this money" to protect his business. (Tr. 723)

Mail fraud is a specific intent crime. See, e.g. *Williams* v. *United States,* 278 F.2d 535, 537 (9th Cir. 1960); *Beck* v. *United States,* 305 F.2d 595, 599 (19th Cir. 1962). Petitioner thus contended at trial that Yonan's threat of economic harm negated the potential existence on his part of an intention to defraud Zenith, and submitted jury instructions in accordance with this theory. However, the Court of Appeals held that Petitioner's defense of extortion was insufficient, and affirmed the refusal of the trial court to instruct the jury in accordance with that theory, on the ground that there had been no explicit threat of economic harm made to Greensphan.

Economic coercion as a defense to a charge of mail fraud has been recognized as a viable concept. See, *United States* v. *Miller,* 340 F.2d 421 (4th Cir. 1965), and *Daniels* v. *United States,* 17 F.2d 339 (9th Cir. 1927). While there is a dearth of case law on the point, the requirement of the Seventh Circuit of an explicit threat of economic harm to sustain the defense is directly at odds with those cases, decided in the context of the Hobbs Act, 18 U.S.C. 1951, that an extortionate threat may be made by other than explicit means. See, *United States* v. *Prochaska,* 222 F.2d 1 (7th Cir. 1955); *United States* v. *Kramer,* 355 F.2d 891 (7th Cir. 1966). The circumstances under which a threat of economic harm may be sufficient to negate an intention to defraud, and thus provide a defense to a charge of mail fraud, is a second issue of significance raised by Petitioner's conviction.

Conclusion

For the above and foregoing reasons, we respectfully submit that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Respectfully submitted,

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